IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2006 Session

STATE OF TENNESSEE v. ROBERT TAYLOR DOWNEY

Direct Appeal from the Circuit Court for Montgomery County
No. 4100305 John H. Gasaway, III, Judge

No. M2005-02335-CCA-R3-CD - Filed February 13, 2007

The appellant, Robert Taylor Downey, was found guilty by a jury in the Montgomery County Circuit Court of especially aggravated robbery, conspiracy to commit especially aggravated robbery, aggravated burglary, and reckless endangerment. The appellant received a total effective sentence of twenty-four years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's denial of his motion to suppress his videotaped oral and written statements, the trial court's refusal to dismiss the indictments after a Rule 16 discovery violation by the State, the sufficiency of the evidence sustaining his especially aggravated robbery and conspiracy to commit especially aggravated robbery convictions, and the imposition of consecutive sentencing. The State concedes that the trial court failed to make the necessary findings for the imposition of consecutive sentencing and asks that the case be remanded. Upon review of the record and the parties' briefs, we affirm the appellant's convictions, but we remand to the trial court for a new sentencing hearing on the issue of consecutive sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed; Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Robert T. Bateman, Clarksville, Tennessee, for the appellant, Robert Taylor Downey.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; C. Daniel Brollier, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In June 2001, a Montgomery County Grand Jury returned a multi-count indictment charging the appellant with conspiracy to commit especially aggravated robbery, especially aggravated

robbery, aggravated burglary, theft, and attempted first degree murder. The State's proof at trial revealed that in April 2001, Barbi Michelle Brown, a co-defendant, was living with her aunt, Patricia Rye, and her aunt's husband, James Neil Rye (hereinafter "Mr. Rye"). While living with the Ryes, Brown met Mr. Rye's father, the victim, Charlie Rye. The victim was "a small, older man" who lived alone in a mobile home and was known to typically carry large amounts of cash.

At trial, Brown testified that on the night of April 11, 2001, she approached the appellant about the possibility of robbing the victim. Brown described the victim's trailer and "how the trailer was laid out." Brown told the appellant that the victim kept a large amount of money in his pants. The appellant agreed to participate in the robbery and recruited co-defendant Marcus Green. At trial, Brown said that the robbery "wasn't very planned out," explaining that "the issue was brought up of physical violence, but it was – rejected within seconds and then the issue was dropped." However, Brown told police that "there was a discussion, what was brought up was, [the appellant] would knock [the victim] out. That was it. And there was – it was not agreed upon and it was dropped and that was the end of the issue."

Later on the night of April 11, 2001, Brown drove the appellant and Green to the victim's residence. Brown remained in the vehicle while the appellant and Green went to the mobile home; the appellant was carrying a red metal flashlight. The appellant opened the door of the mobile home, and the two men ran in. The appellant saw the victim and struck him six times in the head with the flashlight. The appellant took the victim's pants and gave them to Green. Green took approximately $3200 from the victim's pants and grabbed a jar full of change before leaving the mobile home. The appellant took the victim's television as he left. Afterward, Green kept the jar of change; the appellant kept the television; and the appellant, Green, and Brown divided the cash evenly between them. The appellant later sold the victim's television.

The next morning, April 12, 2001, Mr. Rye drove past the victim's house and noticed that the door was open. Also, the victim's vehicle was still there, and Mr. Rye found it unusual that his father had not left for work. Mr. Rye became concerned and went into the mobile home. He found the victim on his bed beaten, bleeding, and incoherent. The victim's pants and wallet were on the end of the bed. Mr. Rye saw blood all over the victim and the wall. The victim's head had been beaten severely, his eyes were swollen shut, and blood was in his mouth. Additionally, the skin of the victim's face was so "blackened" that it was impossible to discern his true skin color or his facial features.

As a result of his injuries, the victim was hospitalized for over a month. The victim's skull injuries were potentially life threatening. Mr. Rye said that after the attack, the victim's thought process was very confused. At trial, the victim testified that "they busted my brains out right there and on the back." He stated that his head was misshapen after the attack.

The appellant presented no proof at trial.

Based upon the foregoing, the jury found the appellant guilty of especially aggravated robbery, conspiracy to commit especially aggravated robbery, aggravated burglary, and reckless endangerment. On appeal, the appellant challenges the trial court's denial of his motion to suppress his videotaped oral and written statements to police, the trial court's denial of his request to dismiss the indictments against him based upon the State's violation of a Rule 16 discovery request, the sufficiency of the evidence supporting his especially aggravated robbery and conspiracy to commit especially aggravated robbery convictions, and the imposition of consecutive sentencing.

II. Analysis

A. Motion to Suppress

The appellant's first issue concerns the trial court's rulings on his motion to suppress his videotaped oral and written statements to police. Prior to trial, the appellant filed a motion to suppress his oral and written statements. At the suppression hearing, Officer Kelly Hewett with the Clarksville Police Department testified that he was present when the appellant was arrested. Because police had used "some flash bangs, noise deterrence" during the arrest, Officer Hewett asked the appellant if he needed any medical care. The appellant declined and "said that we didn't need to do all that that he was going to turn himself in in the morning." Officer Hewitt acknowledged that his follow-up report on the arrest indicated that the appellant had claimed that he was going to turn himself in after he had retained an attorney. Officer Hewett believed he had conveyed that information to Investigator Hodge.

Investigator Larry Hodge with the Montgomery County Sheriff's Department testified that after Officer Hewitt brought the appellant to the Criminal Justice Center, he and Lieutenant Pat Vaden interviewed the appellant. Prior to the interview, Investigator Hodge read aloud the appellant's Miranda rights while the appellant read along on the rights form.[1] The appellant said that he understood his rights and signed the waiver of rights form. At that point, Investigator Hodge realized that he had forgotten to activate a videotaping device to record the interview. He left the room to begin recording, and when he returned, the appellant gave an oral statement to the officers.

Investigator Hodge recalled that after the appellant's oral statement, the officers asked the appellant to write a statement. Investigator Hodge told the appellant that giving the statement could not hurt him and could possibly help him. The appellant asked if he could make a telephone call, and Investigator Hodge told the appellant that he could call someone after the officers took him "downstairs" following the completion of the written statement. A few minutes afterward, the appellant asked if he could give his written statement later. Investigator Hodge told the appellant that they needed to get the appellant's written statement at that time. A copy of the videotape of his oral and written statements was played for the trial court.

[1] See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

The statements reflect that the appellant was approached by Brown about robbing the victim. Brown showed the appellant the mobile home, and the appellant told her he would need some help with the robbery. The appellant recruited Green to participate in the robbery. Brown described the inside of the mobile home and said that the money was located in the victim's pants. Brown drove the appellant and Green to the victim's mobile home. She supplied the appellant with a flashlight. The appellant and Green went into the mobile home, and the victim woke up. The appellant hit the victim six times with the flashlight. The appellant got the victim's pants and gave them to Green who took the money from the pocket. Green also picked up a "bucket of money." The appellant carried a television to the vehicle in which Brown was waiting. The appellant, Brown, and Green left the mobile home, drove "down the road," and split the money.

The appellant presented no proof at the suppression hearing.

On appeal, the appellant challenges the admissibility of his oral and written statements due to the denial of his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination.[2] Specifically, regarding the Sixth Amendment claim, the appellant contends that "an arrest warrant had already been issued" for him before he gave the statements, thus triggering his right to counsel. Further, the appellant argues that he told his arresting officer that "he was going to turn himself in after he had retained an attorney," thereby invoking his right to counsel. The appellant's Fifth Amendment claim concerns his complaint that his statements were not voluntary but were induced by improper statements by law enforcement. We will address each of these issues in turn.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Accordingly, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Moreover, "when a trial court's findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness." State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000). When the evidence reviewed by a trial court includes both evidence not requiring a credibility determination and evidence requiring a factual finding of credibility, a "dual standard of review" will be employed. State v. Treva Dianne Green, No. E1999-02204-CCA-R3-CD, 2000 WL 1839130, at *7 (Tenn. Crim. App. at Knoxville, Dec. 14, 2000).

[2] We note that the appellant's videotaped oral statement was not admitted at trial due to the State's violation of a discovery order. Thus, any motion to suppress argument relating to the oral statement is moot. However, because the written statement was made immediately after the oral statement, we will discuss the oral statement as it pertains to the voluntariness of the written statement which was used against the appellant at trial.

The State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. We note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

In the instant case, the trial court made no findings of fact on the record at the suppression hearing or in its order denying the appellant's motion to suppress. We caution that "[w]hen factual issues are involved in deciding a motion, the court *shall* state its essential findings on the record." Tenn. R. Crim. P. 12(e) (emphasis added). However, although the trial court made no findings of fact contemporaneously with the motion to suppress, the trial court stated at trial:

> The Court's finding when it denied the [appellant's] motion to suppress was that [the appellant] was not coerced; that he was not under the influence of any substance that affected his mental capacities; that he was able to understand and did sign a waiver of his Miranda rights in terms of relying on them; that he – although he was in custody and he gave a statement after being properly Mirandized and that the statement was made knowingly, willingly and voluntarily.
>
> . . . [T]he Court's previous finding [was] that [the appellant] acted willingly, knowingly and with a complete understanding of the consequences of his actions, that is that what he said could be used against him later in a court proceeding if he chose to make a statement. He made that choice, he made the statement.

As we noted earlier, the appellant contends for the first time on appeal that his Sixth Amendment right to counsel was violated when police questioned him without giving him the benefit of counsel.[3] However, we note that at no point in the trial court did the appellant argue that his Sixth Amendment right to counsel had attached when an arrest warrant was issued. We will not address issues raised for the first time on appeal. State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996); State v. Turner, 919 S.W.2d 346, 356-57 (Tenn. Crim. App. 1995). We conclude that this issue has been waived. Likewise, we consider waived the appellant's claim that his Sixth Amendment right to counsel was violated when he told Officer Hewett that he had planned to turn himself in after retaining an attorney.

Turning to the appellant's Fifth Amendment claims, we note that the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution generally provide a privilege against self-incrimination to individuals accused of criminal activity, thus

[3] The State failed to address this issue in its appellate brief.

necessitating our examination of the voluntariness of a statement taken during custodial interrogation. State v. Callahan, 979 S.W.2d 577, 581 (Tenn. 1998). Specifically, for a confession to be admissible, it must be "free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996) (quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897)). Further, to determine the admissibility of a confession, "the particular circumstances of each case must be examined as a whole." Id. To this end, "'[o]nce warnings have been given, . . . [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At that point, he has shown that he intends to exercise his Fifth Amendment privilege." State v. Crump, 834 S.W.2d 265, 269 (Tenn. 1992) (quoting Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627 (1966)).

If, prior to making a statement, the police inform the accused of his Miranda rights and the accused proceeds to knowingly and voluntarily waive those rights, the statement is then admissible against the accused due to the valid waiver of the privilege against self-incrimination. Callahan, 979 S.W.2d at 581 (citing Miranda, 384 U.S. at 444-445, 86 S. Ct. at 1612, 1630). Furthermore, this court has stated:

> Coercive police activity is a necessary prerequisite in order to find a confession involuntary. The crucial question is whether the behavior of the state's officials was "such as to overbear [the appellant's] will to resist and bring about confessions not freely self-determined." The question must be answered with "complete disregard" of whether or not the accused was truthful in the statement.

State v. Phillips, 30 S.W.3d 372, 377 (Tenn. Crim. App. 2000) (citations omitted).

In determining the validity of a waiver of Miranda rights, "the State need only prove waiver by a preponderance of the evidence. In determining whether the State has satisfied that burden of proof, courts must look to the totality of the circumstances." State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997) (citation omitted). In the course of our examination, we consider the following factors in determining the voluntariness of a confession: the appellant's age; education or intelligence level; previous experience with the police; the repeated and prolonged nature of the interrogation; the length of detention prior to the confession; the lack of any advice as to constitutional rights; the unnecessary delay in bringing the appellant before the magistrate prior to the confession; the appellant's intoxication or ill health at the time the confession was given; deprivation of food, sleep, or medical attention; any physical abuse; and threats of abuse. State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996). Proof that an accused was made aware of his Miranda rights, although not conclusive, weighs in favor of the admission of a confession into evidence. See State v. Carter, 16 S.W.3d 762, 767 (Tenn. 2000)

The appellant does not argue that he was not apprised of his Miranda rights, nor does he contend that he did not validly waive his Miranda rights. The appellant specifically contends that three factors impacted the voluntariness of his written statement: (1) Investigator Hodge telling him that giving the statement "can't hurt you at all – and can certainly help you"; (2) Investigator Hodge not allowing him to make a telephone call until the written statement was made; and (3) Investigator Hodge denying his request to give the written statement at a later time.

The videotape of the appellant's oral and written statements reflects that the appellant was concerned about whether his co-defendants were in police custody. The officers told the appellant that the co-defendants were in custody and were telling their version of the story. Investigator Hodge told the appellant that giving a statement could not hurt him and could possibly help him. Investigator Hodge explained that the police could explain the appellant's cooperation to the district attorney's office in exchange for possible leniency in bond or sentencing. This court has previously found that such statements were not sufficient to overbear an accused's will so as to render a statement involuntary. See State v. Johnson, 765 S.W.2d 780, 782 (Tenn. Crim. App. 1988); State v. Clarence David Schreane, No. E2005-00520-CCA-R3-CD, 2006 WL 891394, at *5 (Tenn. Crim. App. at Knoxville, Apr. 5, 2006), perm. to appeal denied, (Tenn. 2006); State v. Mario Pendergrass, No. M1999-02532-CCA-R3-CD, 2002 WL 517133, at *11 (Tenn. Crim. App. at Nashville, Apr. 5, 2002).

The appellant also complains that his request to make a telephone call was denied. The videotape reflects that just prior to making his written statement, the appellant asked when he would be permitted to make a telephone call. Investigator Hodge explained that after the appellant finished with his written statement, he would be taken "downstairs" and allowed to use the telephone. We conclude that this exchange was in no way coercive.

Finally, the appellant contends that his request to give his written statement at a later time indicated his desire to remain silent. The videotape of the appellant's statements reflects that after the appellant gave his oral statement, police requested that he give a written statement. The officers gave the appellant the opportunity to go to the restroom or have something to drink. The officers then left the appellant in a room with a pen and paper. After a few moments, the appellant knocked on the door of the interview room and asked if he could give his written statement later. Investigator Hodge responded, "No, we got to go on and get that done now." The appellant immediately sat and began to write his statement. When Investigator Hodge returned to the room, he began reviewing the written statement with the appellant. The appellant realized that he had left out some important details, and he freely added to his written statement. We conclude that the appellant's request to give his written statement later was not a clear and unequivocal expression that he wished to remain silent. To the contrary, we conclude that the appellant's comment indicates that he was willing to continue his statement, just at another time. We also conclude that none of the officers' statements rendered the appellant's written statement involuntary. The trial court did not err in ruling that the written statement was admissible at trial.

B. Motion to Dismiss Indictments

The appellant's next issue concerns the trial court's refusal to dismiss the indictments against him as a sanction for the State's failure to comply with a discovery order. At trial, the State called Investigator Hodge as a witness. Investigator Hodge testified regarding the substance of the appellant's written statement to police. Then, the State asked to play the videotape of the appellant's oral statement to police. The appellant renewed his objection to the videotape, and the trial court overruled the objection. A few minutes into the playing of the videotape, the trial court stopped the proceedings and called for a sidebar. The court noted that at the beginning of the videotape, the officers told the appellant the ranges of punishment he faced with each of his charges. The court cautioned that it would not let such information before the jury.

At that time, defense counsel asked if the videotape being played for the jury was the same one that had been furnished to the defense and played at the suppression hearing. The State said, "It's the same – a duplicate of it." The arguments continued, and the trial court called for a jury-out hearing. A recess was taken during which the State explained that, unbeknownst to the State, the first few minutes of the interview were not copied when a duplicate of the original videotape was made for the State and the defense. The defense asked for a dismissal of the indictments against the appellant in light of the State's failure to comply with discovery.

The trial court found that the State's explanation "that the error was made at the hands of law enforcement is just not sufficient under the law. The [State] is required to make sure that discovery is complied with completely. And it's an insufficient reason when the [State] says well, I just gave him what they gave me." The court considered the proper sanction to impose and found that a dismissal of the indictments would not be justified. However, the trial court determined that the appropriate sanction was to deny the State the use of the videotape during its case-in-chief. The defense then moved for a mistrial, which motion was denied. The court resumed the trial and instructed the jury to disregard anything on the videotape concerning range of punishment.

On appeal, the appellant contends:

> [T]he issue to be addressed at this juncture of the proceedings is that the trial court erred by not dismissing the indictment on the [appellant's] motion made at trial when it was discovered that the State had failed to disclose the entire videotape pursuant to the [appellant's] motion for discovery and at the hearing on the motion to suppress. In fact, the State, through Investigator Hodge, presented sworn testimony that the incomplete copy of the tape admitted at the suppression hearing was the entire tape. The failure of the State to disclose the entire portion of the [appellant's] videotaped statement bars the State from using the statement in its case-in-chief or at a re-trial.

We note that Tennessee Rule of Criminal Procedure 16(a) mandates the disclosure by the State to the appellant of certain discoverable evidence, such as a defendant's statements to police. If a party fails to comply with a discovery order, a trial court may:

> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;
>
> (B) grant a continuance;
>
> (C) prohibit the party from introducing the undisclosed evidence; or
>
> (D) enter such other order as it deems just under the circumstances.

Tenn. R. Crim. P. 16(d)(2).

Although Rule 16 does not explicitly provide that a court may sanction the State by a dismissal of the indictment after failure to comply with a discovery order, the rule nevertheless provides that the court may enter such sanction "'as it deems just under the circumstances." State v. Collins, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000) (quoting Tenn. R. Crim. P. 16(d)(2)). This court has previously concluded that the open-ended language of Rule 16(d)(2) authorizes a dismissal of an indictment in certain circumstances when a court would otherwise have "no effective sanction for failure to comply with its order." Id. However, Rule 16 also provides "[o]ther less drastic methods for acquiring compliance." State v. Street, 768 S.W.2d 703, 710 (Tenn. Crim. App. 1988). A trial court has great discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction imposed should fit the circumstances of the case. Collins, 35 S.W.3d at 585. In the instant case, the trial court determined that a dismissal of the indictments against the appellant was not justified and that the appropriate sanction was to prohibit the introduction of the videotape during the State's case-in-chief. We conclude that disallowing the use of the videotape was an effective sanction. The appellant is not entitled to relief.

C. Sufficiency of the Evidence

Next, the appellant argues that the evidence adduced at trial was insufficient to sustain his convictions for especially aggravated robbery and conspiracy to commit especially aggravated robbery. First, the appellant contends that the flashlight he used to hit the victim did not constitute a "deadly weapon"; thus, his convictions of both offenses cannot be sustained. As to the conspiracy conviction, the appellant argues that "there is no proof of intent by anyone individually or together to conspire to use a deadly weapon" and the conviction should be reversed. Finally, the appellant argues that the "verdict is contrary to the weight of the evidence." In support of his contention, the appellant maintains that without his written statement, erroneously admitted by the trial court, there is no corroboration to support the testimony of Brown, an accomplice.

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a) (2003). Especially aggravated robbery is robbery accomplished with a deadly weapon where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-403(a)(1) and (2) (2003). "The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense." Tenn. Code Ann. § 39-12-103(a) (2003).

First, we will address the appellant's conviction for especially aggravated robbery. The proof at trial was uncontroverted that Brown approached the appellant about robbing the victim. The appellant agreed to commit the robbery and recruited Green to help him. Brown drove the men to the residence. The appellant, carrying a metal flashlight and accompanied by Green, entered the residence. When he encountered the victim in his bedroom, the appellant hit the victim on the head six times using the flashlight. The appellant and Green took over $3000, a jar full of change, and the victim's television from the residence. The appellant, Green, and Brown left the victim at the residence and later split the proceeds from the robbery. The victim's son found him the next day, severely beaten. The victim was hospitalized for over a month. At the time of trial, the victim's head was still misshapen, and he continued to suffer from confusion.

Initially, we note that the appellant is correct in contending that because Brown is an accomplice, her testimony must be corroborated in order to sustain his conviction. State v. McKnight, 900 S.W.2d 36, 47 (Tenn. Crim. App. 1994). The appellant argues that his written statement should have been suppressed, and that without the statement there is no evidence to corroborate Brown's testimony. However, as we earlier concluded, the appellant's written statement was properly admitted at trial. The appellant's statement corroborated Brown's testimony, almost in its entirety. At any rate, the general rule is that evidence sufficiency is judged by the evidence admitted at trial, including any evidence that was erroneously admitted. State v. Longstreet, 619 S.W.2d 97, 101 (Tenn. 1981). Thus, this issue is without merit.

We also conclude that the evidence adduced at trial clearly shows that the appellant stole property from the victim and that the victim suffered serious bodily injury. However, the appellant contends that the State failed to prove that the metal flashlight employed was a "deadly weapon." A deadly weapon is defined as "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-106(a)(5)(B) (2003). This court has previously concluded that "[o]bjects other than traditional weapons may, depending on their use, be deadly." State v. Eaves, 959 S.W.2d 601, 604 (Tenn. Crim. App. 1997). In fact, "[a] pillow, a sock, telephone wire, a hairbrush, and a long-handled flashlight have all been held to constitute deadly weapons because of the manner in which they were used." Id. The jury, as was their prerogative, determined that the flashlight used by the appellant was a deadly weapon. The appellant is not entitled to relief on this issue.

Turning to the appellant's conviction for conspiracy to commit aggravated robbery, we note that the appellant contends that there was no proof of an agreement to use a deadly weapon. "[T]he essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act[; however], the agreement need not be formal or expressed, and it may be proven by circumstantial evidence." State v. Pike, 978 S.W.2d 904, 915 (Tenn. 1998) (citations omitted). "'The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise. Conspiracy implies concert of design and not participation in every detail of execution.'" Id. (quoting Randolph v. State, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978)).

The proof at trial revealed that Brown and the appellant agreed to rob the victim. Brown acknowledged that they discussed what to do if the victim was present or if he awoke. Brown also acknowledged that she told police that "there was a discussion, what was brought up was, [the appellant] would knock [the victim] out. That was it. And there was – it was not agreed upon and it was dropped and that was the end of the issue." In sum, Brown's testimony reflected that prior to the robbery, she and the appellant discussed the possibility of the appellant knocking the victim out. The appellant went into the residence with a red metal flashlight which he used to brutally beat the victim. We conclude that the jury could have easily found that the appellant "was acting puruant to a tacit agreement" between himself, Green, and Brown to rob the victim and potentially injure him. See State v. Price, 46 S.W.3d 785, 819 (Tenn. Crim. App. 2000); State v. Carl Preston Durham, No. E1999-02640-CCA-R3-CD, 2001 WL 363068, at *10 (Tenn. Crim. App. at Knoxville, Apr. 12, 2001); State v. Kenneth Paul Dykas, No. M2000-01665-CCA-R3-CD, 2002 WL 340600, at *7 (Tenn. Crim. App. at Nashville, Mar. 5, 2002).

D. Consecutive Sentencing

As his final issue, the appellant argues that the trial court erred in imposing consecutive sentencing. The trial court sentenced the appellant as a Range I standard offender to eight years for the conspiracy to commit especially aggravated robbery conviction, three years for the aggravated burglary conviction, one year for the reckless endangerment conviction, and twenty years for the especially aggravated robbery conviction. The trial court ordered the twenty-year sentence to run

concurrently with the eight-year sentence. The court further ordered the one-year sentence to run consecutively to the three-year sentence which was to run consecutively to the twenty-year sentence for a total effective sentence of twenty-four years. The appellant contends that the trial court did not make the requisite findings necessary to impose consecutive sentencing after finding that the appellant is a dangerous offender. The State agrees and asks this court to remand to the trial court for a new sentencing hearing solely on the issue of consecutive sentencing.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

We note that "[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) (2003) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). In the instant case, the trial court imposed consecutive sentencing based upon its finding that the appellant "is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). In order to find that a defendant is a dangerous offender, a court must also find that "(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) 'the terms are reasonably related to the severity of the offenses.'" Wilkerson, 905 S.W.2d at 938; see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999).

At the sentencing hearing, the parties submitted no testimony, relying instead upon the proof at trial and the appellant's presentence report. We note that at trial, Investigator Hodge indicated that the appellant was the only one of the three perpetrators that expressed remorse for the offenses. According to the presentence report, the twenty-five-year-old appellant had two previous misdemeanor theft convictions and a misdemeanor escape conviction. The appellant reported that when he was five years old, his family "turned him over" to the Department of Children's Services and thereafter he was "bounced around" between different foster homes and group homes until he turned eighteen. At the age of eighteen, he was essentially "put out on the streets," and he "has no close friends or any family. [He] is on his own."

The trial court summarily imposed consecutive sentencing due to the appellant being a dangerous offender; the court did not explain its finding nor did it make the requisite Wilkerson findings that the sentences are necessary in order to protect the public from the appellant's further misconduct and the terms are reasonably related to the severity of the offenses. Wilkerson, 905 S.W.2d at 938. In other words, there is no evidence in the record that the trial court considered the Wilkerson factors before ordering consecutive sentencing. Accordingly, this matter is remanded for a new sentencing hearing regarding the propriety of consecutive sentencing.

III. Conclusion

We affirm the appellant's judgments of conviction, but we remand for a new sentencing hearing regarding the issue of consecutive sentencing.

_____

NORMA McGEE OGLE, JUDGE